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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~958~~ 127

JACOB LEMON WILEY, EVA P. WILEY and CHRISTINE WILEY DEAVER

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CLYDE A. DOUGLASS,
Insurance Building,
Raleigh, N. C.

THOMAS A. BANKS,
Insurance Building,
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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Jacob Ulmon Wiley, Eva P. Wiley and Christine Wiley Deaver, pray that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit in the above case.

CITATIONS TO OPINIONS BELOW

The judgments of the Trial Court, the District Court of the United States for the Eastern District of North Carolina, Raleigh Division, as to the three petitioners appearing herein as Ap-

pendix—A, page 7. These judgments were entered on October 15, 1959. The judgment of the United States Court of Appeals for the Fourth Circuit appears herein as Appendix B, page 13. This judgment was entered on April 20, 1960. The charge of the trial court appears herein as Appendix C, page 24. Copy of article appearing in *The News and Observer* appears herein as Appendix D, page 37. Copy of article appearing in *The Raleigh Times* appears herein as Appendix E, page 38. The order of the United States Court of Appeals for the Fourth Circuit denying the appellants' (petitioners') petition for a rehearing appears herein as Appendix F, page 39. This order was entered on May 5, 1960. Appellants' (petitioners') brief in the United States Court of Appeals, incorporated by reference and filed with the Supreme Court of the United States, is designated Appendix G, page 40.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 20, 1960. Rehearing was denied on May 5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Did the District Court commit reversible error in denying the defendants' (petitioners') motion to set aside the verdicts of guilty for that the defendants, under the circumstances, did not have and could not have had a fair and an impartial trial?

2. Did the District Court commit reversible error in denying the defendants' (petitioners') motions for separate trials?

3. Did the District Court commit reversible error in the admission and exclusion of evidence and in the charge to the jury?

STATUTES INVOLVED

The statutory provisions involved are 26 U.S.C. Sections 4741, 4742 (a) and 4744 (a) which are set forth in the charge of the District Court, designated Appendix C, page 24.

STATEMENT OF THE FACTS

Jacob Ulmon Wiley, Eva P. Wiley, his wife, and Christine Wiley Deaver, their daughter, who lived in a separate home with her family, were charged in an indictment of five counts for violating the provisions of 26 U.S.C. §§4742(a) and 4744(a) with respect to the transfer of marijuana without having paid a special tax required by 26 U.S.C. §4741 and without receiving a written order from the transferor. The accused were not joined as defendants in all of the counts, and no conspiracy was charged.

When the case was called for trial Counts 1 and 3 of the indictment were dismissed on motion of defendants, and the case proceeded to trial on Counts 2, 4 and 5.

Upon the call of the case, each of the petitioners entered a plea of not guilty, each objected to a joint trial and moved for severence. The motions were denied.

At the conclusion of the government's evidence, each petitioner moved the court for a verdict of acquittal, and again at the conclusion of all the evidence each petitioner moved the court for a verdict of acquittal. Each of the motions were denied and the remaining counts were submitted to the Jury. Petitioners moved the court to dismiss the counts on account of unlawful entrapment of defendants by Government Agents and for instructions as requested, which motions were denied.

Upon the coming in of the verdict of guilty as charged, petitioners moved to set aside the verdict—first, on the grounds that the verdict was against the evidence, and second, on the grounds that petitioners could not have had an impartial trial on marijuana charges in Raleigh at the time of the trial in view of newspaper publicity concerning arrest on marijuana

charges of other persons living in the same rural area where petitioners lived. These motions were denied.

Petitioner Jacob Ulmon Wiley, age 69, was sentenced to 5 years imprisonment on Count 2; Christine Wiley Deaver was sentenced to 5 years imprisonment on Count 2, and 5 years on Count 4, to run concurrently; and Mrs. Eva P. Wiley was sentenced to 5 years on Count 4 and 2 years on Count 5, to run concurrently.

On the 26th day of October, 1959, each of the petitioners gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, where the case was argued on March 16, 1960. In its decision dated April 20, 1960, the case was affirmed.

Thereafter, petitioners and each of them, duly filed petitions in the United States Court of Appeals for the Fourth Circuit for a rehearing. Each petition for rehearing was denied by order filed on May 5, 1960.

REASONS FOR GRANTING THE WRIT

1. The petitioners, Jacob Ulmon Wiley, age sixty-nine, and his wife, Eva P. Wiley, and their daughter, Christine Wiley Deaver, colored people, each and every of the highest character, were convicted by an all-white male jury for the alleged possession of and the transfer without a written order and without paying the required tax for about one pound of marijuana seed.

The jury appeared to be fair and impartial when selected by the Court, but after the trial had begun there appeared articles in the two daily papers in Raleigh, the morning paper, *The News and Observer*, Appendix D, and the afternoon paper, *The Raleigh Times*, Appendix E, in regard to the arrest of three colored people, a man, his wife and a helper, who lived in the vicinity of the petitioners, charging them with the extensive growing and sale of marijuana, and the petitioners state that these articles produced for the jury an atmosphere and

a feeling of conviction to such an extent that at that time the defendants did not have and could not have had a fair and impartial trial. Amendment VI of the Constitution of the United States.

2. The petitioners further state that under the facts and circumstances, with about one pound of marijuana seed involved, which could not be smoked, and which, in the hands of government agents, would not be planted, the punishment inflicted by the law under verdicts of guilty, was cruel and unusual (Amendment VIII of the Constitution of the United States), with no discretion in the Trial Judge for probation or for changing the penalty provided by the law, the punishment being the destruction of these two highly reputable families, with no sign of a court record against any one of them, with the daughter to leave her infant children. The petitioners state that such punishment under the circumstances is not contemplated by the law and was without due process of law and did not provide for the defendants, under the circumstances, the equal protection of the laws. (Amendment XIV of the Constitution of the United States.)

3. The petitioners state further that the Trial Judge committed reversible error in denying the petitioners' motions for a severance, that, is for separate trials, after the Court had indicated that the cases would be consolidated for trial. (McElroy vs. United States, 162 U.S. 76, United States vs. Schoffer, 266 Fed. 2d 435 and Deluca vs. United States, 299 Fed. 741), and that apart from the question of abuse of discretion the consolidation of these cases for trial has resulted in grave and gross injustice for the three petitioners, and noticeably for the wife and daughter, which injustice the petitioners say the Supreme Court of the United States should correct with the requirement of separate trials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A-1

UNITED STATES DISTRICT COURT

For The

EASTERN DISTRICT OF NORTH CAROLINA

United States of America

v.

JACOB ULMON WILEY

No. 54-58-Cr.—RALEIGH DIVISION

On this 13th day of October, 1959 came the attorney for the government and the defendant appeared in person and by counsel, entered a plea of not guilty, jury trial.

Count 1 dismissed on motion of defendant.

On October 15, 1959:

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of transferring marihuana without proper written order in violation of Title 26, U.S.C., Sec. 4742(a), as charged in Count 2, and on October 16, 1959 the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 2—Five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall

or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ALGERNON L. BUTLER
UNITED STATES DISTRICT JUDGE

A. HAND JAMES, Clerk

A True Copy. Certified this 23rd day of October, 1959.

(Signed) A. HAND JAMES, Clerk

(By) KEEN JONES, Deputy Clerk

APPENDIX A-3

UNITED STATES DISTRICT COURT

For The

EASTERN DISTRICT OF NORTH CAROLINA

United States of America

v.

EVA P. WILEY

No. 54-58-Cr.—RALEIGH DIVISION

On this 13th day of October, 1959 came the attorney for the government and the defendant appeared in person and by counsel, entered a plea of not guilty, jury trial.

Count 3 dismissed on motion of defendant.

ON OCTOBER 15, 1959:

IT IS ADJUDGED that the defendant has been convicted upon her plea of not guilty, and a verdict of guilty of the offenses of "transferring marihuana without proper written order, in violation of Title 26, U.S.C., Sec. 4742(a), and acquiring marihuana without having paid the tax required by law, in violation of Title 26, U.S.C., Sec. 4744(a)," as charged in Counts 4 and 5, and on October 16, 1959 the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 4—Five (5) years, Count 5—Two (2) years—to run concurrently with sentence imposed in Count 4.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ALGERNON L. BUTLER
UNITED STATES DISTRICT JUDGE

A. HAND JAMES, Clerk

A True Copy. Certified this 23rd day of October, 1959.

(Signed) A. HAND JAMES, Clerk

(By) KEEN JONES, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 8007

Jacob Ulmon Wiley, Eva P. Wiley, and
Christine Wiley Deaver,
Appellants,

versus

United States of America,
Appellee.

Appeals from the United States District Court
for the Eastern District of North Carolina,
at Raleigh.
Algernon L. Butler, District Judge.

(Argued March 16, 1960. Decided April 20, 1960.)

Before SOPER, HAYNSWORTH and BOREMAN,
Circuit Judges.

Robert Leroy McMillan and Thomas A. Banks for Appellants, and Samuel A. Howard, Assistant United States Attorney, (Julian T. Gaskill, United States Attorney, on brief) for Appellee.

SOPER, Circuit Judge:

Jacob Ulmon Wiley, Eva P. Wiley, his wife, and Christine Wiley Deaver, their daughter, were charged in an indictment of five counts for violating the provisions of 26 U.S.C.

§§4742(a) and 4744(a) with respect to the transfer of marijuana without having paid a special tax required by 26 U.S.C. §4741 and without receiving a written order from the transferee. The transactions were charged to have occurred on diverse dates in June, July and August, 1958, in the eastern district of Virginia. The accused were not joined as defendants in all of the counts. When the case was called for trial and before any evidence was taken counts 1 and 3 of the indictment were dismissed on motion of the defendants without objection by the United States and the case proceeded to trial on counts 2, 4 and 5.

Count 2 charged that, on June 11, 1958, Jacob and Christine, in violation of §4742(a), feloniously transferred 1382.30 grains of marijuana to Revenue Agent Richard M. Patch without receiving a written order from him on a form issued by the Secretary of the Treasury or his delegate.

Count 4 charged that on July 8, 1958, Eva and Christine made a transfer of 3835.90 grains of marijuana to the agent without a written order in the same way as charged in count 2.

Count 5 charged that Eva, on August 18, 1958, feloniously acquired 7 ounces of marijuana without having paid the tax required by §4741.*

* Section 4741 provides in effect that there shall be imposed upon all transfers of marijuana, required by §4742 to be carried out in pursuance of written order forms, taxes at certain rates, including a tax of $100.00 per ounce of marijuana or fraction thereof upon each transfer to any person who has not paid the special tax and registered under §§4751-4753.

Section 4742(a) provides: "It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marijuana, except in pursuance of a written order of the person to whom such marijuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Section 4744(a) provides: "It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) to acquire or otherwise obtain any marijuana without having

At the call of the case the defendants pleaded not guilty and objected to a joint trial and moved for a severance but the motion was denied. At the conclusion of the Government's evidence and again at the conclusion of all of the evidence the defendants moved for a verdict of acquittal but these motions were also denied. The jury found the defendants guilty as charged and thereupon Jacob was sentenced to five years imprisonment on count 2, Christine to five years on count 2 and five years on count 4 to run concurrently, and Eva to five years on count 4 and two years on count 5 to run concurrently. These were minimum sentences under 26 U.S.C. §7237.

The evidence on behalf of the Government tends to show the following facts. The three defendants live near Garner and Raleigh, North Carolina. The husband and wife live together while their daughter lives in a separate house nearby with her husband and children. She and her husband operate a store close to their house. On June 11, 1958, Agent Patch purchased 1382.20 grains of marijuana seeds, stems and fragments of marijuana leaves from Jacob and Christine, his daughter. The agent had previously met the three defendants at the daughter's store and had talked to Jacob about marijuana. Returning to the store on June 11th he talked with Christine, who told him that she had no marijuana but did have enough marijuana seed to plant four acres of land, and she explained the proper way to cultivate and harvest the crop. Later, on the same day, they were joined by Jacob and the three of them went to the rear of his house where he produced a paper bag containing two pounds of marijuana, of which Agent Patch purchased 1382.20 grains, which Jacob placed in a plastic cheese container and sold to him for $20.00. The material was sub-

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paid such tax; and proof that any person shall have had in possession any marijuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741(a)."

sequently weighed with precision and analyzed by the Government chemists and was found to consist of marijuana. On this and other visits made by the narcotic agents to the Wiley home in search of violations of the law the agents were assisted by one Alfred Blount, a special employee of the service who had an unsavory record as a violator of the narcotic and lottery laws.

On July 8, 1958, Agent Patch returned to the Wiley house and met Christine and her mother, Eva. In response to a request by him to buy more of the marijuana seed, Christine produced a paper bag containing about one pound of the substance and sold it to him for $50.00. The material was weighed in the presence of the two women and the agent on a set of scales produced by Eva and found to weigh about one-half pound. The agent did not present to the defendants either on June 11th or July 8th a written order for marijuana on a form issued in accordance with §4742(a) of the Act.

On August 18, 1958, John L. Kelly, a narcotic agent in charge of the District Office at Greensboro, North Carolina, executed a search warrant on the Wiley house in company with several other agents, including Agent Robert W. Pope. At the time of the search all three of the defendants were present. Pope remained in the living room with the defendants while the other agents searched other parts of the house. He granted Eva's request to leave the room but stood in the doorway to observe her actions and noticed an attempt on her part to conceal upon her person an object which proved to be a brown paper bag. He called the other agents, who demanded the production of the bag and she refused until directed by her husband to produce it. The bag contained a quantity of marijuana seed, stems and fragments of leaves, which weighed approximately seven ounces. At that time, in response to questions, all three of the defendants stated that the marijuana had been brought to their home by one Daniel George, who raised marijuana on a farm between Selma and Zebulon, North Carolina.

Prior to executing the search warrant Jacob Wiley, out of the presence of the other defendants, told Agent Kelly that "Dan" had approximately twenty pounds of marijuana that he [Jacob] was going to sift that night." An objection to the last mentioned statement of Jacob was overruled but the jury were instructed that they should consider the testimony as relating to Jacob alone and should not regard it at all with respect to the other two defendants.

It was shown that during the period covered by the counts of the indictment in suit no one of the defendants had registered his name and place of business with the official in charge of the Internal Revenue District in which his place of business was located, as required by §4753 of every person who is subject to the tax imposed by §4751 upon every person who sells or deals in marijuana. Nothing was said to any of the parties on August 18, before their arrest, as to whether they had a written order or orders for the marijuana that had been transferred, but after the defendants had been taken into custody and were asked to produce the order form required by the statute, each one said that he did not have a form and could not produce it. It was also brought out that no form of order for the handling of marijuana had been issued by the Government.

Agent Patch testified on direct examination in respect to a conversation which he had with Christine on July 8, 1958, the day when Agent Patch purchased a half pound of marijuana for $50.00. He testified over objection that at the time Christine said that she did not have any marijuana that day but that there was a person within "hollering distance" who had a "nice crop of marijuana growing." She also said that she "had marijuana growing on her husband's peoples farm in Jacksonville, North Carolina" and that that crop would be harvested the latter part of August. This testimony was taken over objection and thereupon a motion to strike the testimony was made and granted and the jury were instructed not to con-

sider the testimony of the witness but erase it from their minds.

The evidence on the part of the defense indicated that the defendants bore an excellent reputation in their community and had been engaged successfully in lawful occupations, Jacob as a shipping clerk, painter and part-time farmer; Eva as a housewife and teacher, with a college degree, in the public schools; and Christine as a housewife, mother of three children, and helper in the store conducted by her husband. But the defendants did not dispute the presence of marijuana in the Wiley house on the three occasions during the summer of 1958 mentioned by the Government agents, although there were differences as to the precise dates. Jacob's account was that on the first occasion he had found the seed in an old refrigerator in the house and had transferred a portion of it to Patch and Blount for $20.00, which was paid to an employee of Jacob and later turned over to him. He knew that marijuana could be grown from the seed. Eva admitted that she was present with her daughter when part of the seed was weighed and transferred to the agents and $50.00 was passed, but she testified that she did not participate in the transaction. She knew the nature of the substance. She also admitted that she knew where the seed was located on the third occasion at the time of the search of her house and tried to conceal it on her person. Christine denied that she was present at the time of the first transfer but admitted she was present on the second occasion when the stuff was weighed and $50.00 was left on the table in her mother's house. No testimony was offered by the defendants that they had paid the tax or otherwise complied with the laws regulating the possession or transfer of marijuana.

Notwithstanding this testimony on both sides, it is argued by the appellants that the judge erred in refusing to grant a severance. The rules of criminal procedure relating to the joinder of defendants in the same indictment were recently considered in the opinion of Chief Judge Sobeloff of this court

in *Ingram v. United States*, 272 F.2d 567, November 5, 1959. It was shown that these rules were a codification of existing law; and that Rule 8(b) permits the joinder of defendants who have participated in the same unlawful act or in the same series of unlawful acts and that the defendants may be charged together or separately and all of them need not be charged in each count. It was further shown that under Rule 13 the court may order separate trials of counts or grant a severance of defendants if justice requires it, and that the grant or denial of a motion for severance or a new trial rests within the discretion of the trial judge and that his decision is not reversible unless an abuse of discretion is affirmatively shown.

It is plain that there was no abuse of discretion in denying the motions for severance in the pending case. It was alleged in the indictment and proved that the defendants participated in the same series of acts, all of which involved transactions in the transfer or possession of marijuana seed during a short period in the summer of 1958. The joinder of father and daughter in the first transaction, the joinder of mother and daughter in the second transaction, and the separate charge against the mother in the third transaction fell strictly within the terms of the rule, and there was no prejudice to the three defendants in trying them together other than that which necessarily attends every joinder of defendants for trial under the established procedure. Rule 8, as we have seen, specifically provides that all of the defendants need not be charged in each count.

It is argued in the pending case that special harm was done to the defendants in the trial below when, on a number of occasions, evidence was introduced of an incriminating statement or action by one or more of the defendants out of the presence of the others. Thus Agent Patch testified that, on June 5, he met all three defendants at the Deaver store and talked to Jacob separately about purchasing marijuana and was told to come back later; and that, on June 11, he talked

to Christine out of the presence of her parents about the same thing at the store and was told that she had no marijuana but did have some seed and that later, on the same day, out of the presence of the mother, he talked with the father and daughter and purchased seed from them.

There was also evidence of a conversation, on August 18, between Agent Kelly and the father in which the latter, out of the presence of the other defendants, told of twenty pounds of marijuana belonging to one Dan George that Jacob was "going to work" that night. The agent, however, testified that all of the defendants explained that the marijuana had been brought to their home by George, who had raised it on his farm.

There is no doubt that all of this evidence contributed to the conviction of the three defendants but objection was not always interposed by the defendants when the evidence was offered. When specific objection was made, the District Judge took appropriate action. For example, when the agent testified as to the statement of Jacob Wiley that he was going to handle the twenty pounds of marijuana on the night of August 18, the jury were instructed that they should consider the testimony as relating only to Jacob Wiley and should not consider it in regard to the other two defendants. On another occasion during the trial Agent Patch was allowed to testify over objection that, on July 8, Christine Deaver told him that she could not get any marijuana for him that day but that there was a person nearby who had "a nice crop of marijuana growing" and that she had marijuana growing on the farm of relatives of her husband in North Carolina which would be ready for harvest in August. After argument this testimony was stricken out and the jury were instructed to disregard and erase it from their minds.

The action taken by the judge on these occasions was in accord with approved procedure. Obviously it is difficult for a jury to erase from their minds testimony which they have heard, but it is not impossible for them to consider a statement of one defendant as evidence only against the speaker. It is well-nigh

inevitable that such incidents should occur with regard to both incriminating statements and incriminating acts of individual defendants when there is a joinder under the permissive provisions of the rules. The matter is one which must be left to the careful consideration of the trial judge, and the course for him to follow is indicated by the following quotation from *Opper v. United States*, 348 U.S. 84, 95, which is particularly pertinent to the incident case:

> "It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Holliñeld's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. The record contains substantial competent evidence upon which the jury could find petitioner guilty."

In view of the close relationship between the defendants in the instant case and the admissions in their testimony at the trial, it is plain that no error was committed in joining them for trial or in receiving the testimony referred to.

A particular contention is made on behalf of Eva Wiley that the evidence was insufficient to sustain the charge in the fifth count that, on August 18, she had acquired seven ounces of marijuana without having paid the tax required by §4741(a) of the Act. It is provided in §4744(a) that possession of the substance shall be presumptive evidence of guilt under this section if the possessor fails after reasonable demand to produce the proper order form required by the statute, which de-

mand was made in this case. The appellant relies on such cases as *Guevara v. United States*, 242 U.S. 745, and *Rodrigues v. United States*, 32 F.2d 819, in which the court found the evidence insufficient to prove possession on the part of the defendant where it seemed more likely that the substance was in possession of another. But these cases have no bearing here since the defendant Eva Wiley herself admitted that she concealed the substance on her person at the time of the search.

We find no substantial basis for the additional argument of the appellants that they should have been acquitted because they were entrapped into the commission of the crimes named in the indictment by the actions of the Federal agents. The law of entrapment is settled by the decision of the Supreme Court in the leading case of *Sorrells v. United States*, 287 U.S. 435, where the Court (page 445) adopted the statement of the applicable principle made by Judge Woods of this court in *Newman v. United States*, 299 F. 128, 131, in the following words:

> ". . . 'It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commision of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commision of a criminal act, the government is estopped by sound public policy from prosecution therefor'."

The actions of the agents in the pending case were investigatory and were not calculated to induce or over-persuade the defendants to commit crimes which otherwise they would not have perpetrated. It is true that the agents made a number of attempts to purchase the contraband substance from the accused, but obviously they did not put the idea of trafficing in the substance into the defendants' minds. Their own testimony

indicates that the marijuana was already in their possession and was being preserved by them when they were first approached. The agents were not in duty bound to disclose their identity and their purpose when they made their first discovery, as the defendants contend. They were well within the proper performance of their duty as investigating officers when they continued their visits in order to ascertain the extent of the defendants' operations.

The question of entrapment was properly submitted in the charge of the judge when the jury were told that the defendants were entitled to an acquittal if the jury should find that they had no previous intent or purpose to violate the law but were induced or persuaded by the representatives of the Government to commit the crime. The instructions were clear and specific on the point and were in accord with the principles laid down by the Supreme Court of the United States.

Nor should the judgments be reversed because the District Judge denied the motion of the defendants to set aside the verdicts on the ground that a fair trial could not be had in the City of Raleigh by reason of certain articles which appeared in the local newspapers during the progress of the case. The articles had no reference to the defendants' case, but merely published the information that two men had been arrested and chargd with illegally harvesting, possessing, and shipping marijuana in the neighborhood of Garner, North Carolina. It is quite clear that the publication of these articles did not require setting aside the verdicts for they did no more than to inform the jury that similar crimes were being committed in the neighborhood, and did not tend to show that the defendants did not have a fair trial.

Affirmed.

APPENDIX C

CHARGE

Gentlemen of the Jury, now that you have heard the evidence and arguments of counsel the time has come for the Court to instruct you as to the law governing this case.

The indictment charges violations of the Internal Revenue Code relating to marijuana. The defendants, and each of them have entered a plea of not guilty. Counsel for the government and counsel for the defendants have ably argued the case and presented to the jury the contentions of the respective parties. The Court is of the opinion that no useful purpose would be served by undertaking to restate or recapitulate the evidence. The Court charges you that it is your duty as jurors to remember all of the evidence in the case. Although you as jurors are the sole judges of the facts you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law but you must consider the entire instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion that you may have as to what the law ought to be it would be a violation of your sworn duty to base verdict upon any other view of the law than that given in the instructions of the Court.

The Court, in its instructions to you on the law of the case, may refer to some of the evidence for purposes of illustration or for advisory help to the jury in the logical application of the law to the facts as the jury may find the facts. But the Court emphasizes again it is the sole power, duty and function of the jury to appraise the evidence and to determine from the evidence the facts of the case, and any reference the Court may make to the evidence is advisory only. You are to perform your duty as sole judges of the facts, without bias or prejudice

to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and render a just verdict, regardless of the consequences.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

The law does not compel a defendant in a criminal action to take the witness stand and testify, and no presumption of

guilt may be raised and no inference of any kind may be drawn from the failure of any defendant to testify. In this case now being tried each of the defendants have testified. The Court charges you that a defendant who wishes to testify is a competent witness, and each defendant's testimony is to be judged in the same way as that of any other witness.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate," with no evidence against him or her. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the United States to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

APPENDIX A-2

UNITED STATES DISTRICT COURT
For The
EASTERN DISTRICT OF NORTH CAROLINA
United States of America

v.

CHRISTINE WILEY DEAVER
No. 54-58-Cr.—RALEIGH DIVISION

On this 13th day of October, 1959 came the attorney for the government and the defendant appeared in person and by counsel, entered a plea of not guilty, jury trial. Counts 1 and 3 dismissed on motion of defendant.

ON OCTOBER 15, 1959:

IT IS ADJUDGED that the defendant has been convicted upon her plea of not guilty, and a verdict of guilty of the offenses of transferring marihuana without proper written order, in violation of Title 26, U.S.C., Sec. 4742(a), as charged in Counts 2 and 4, and on October 16, 1959 the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 2—Five (5) years. Count 4—Five (5) years—to run concurrently with sentence imposed in Count 2.

IT IS ORDERED that the Clerk deliver a certified copy of this

judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ALGERNON L. BUTLER
UNITED STATES DISTRICT JUDGE

A. HAND JAMES, Clerk

A True Copy. Certified this 23rd day of October, 1959.

(Signed) A. HAND JAMES, Clerk

(By) KEEN JONES, Deputy Clerk

In a case where two or more persons are charged with the commission of a crime, the guilt of a defendant may be established without proof that such defendant personally did every act constituting the offense charged.

The Court charges you that "whoever commits an offense against the United States, or wilfully aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal"; and "whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Every person who thus wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if done voluntarily and purposely and with specific intent to do what the law forbids; that is to say, with evil motive or bad purpose either to disobey or to disregard the law.

In order to aid and abet another to commit a crime it is necessary that the defendant wilfully associate himself in some way with the criminal venture; and that he or she wilfully participate in it as in something he wishes to bring about; and that he wilfully seeks by some action of his to make it succeed. Mere presence where an act is being done with no participation would not constitute aiding and abetting and would not be evidence of guilt, and if a defendant is only present and does not aid, abet, counsel, command, induce, or procure or wilfully cause an offense to be committed, he or she would not be guilty because mere presence is not sufficient.

The defendants have introduced evidence tending to show their good character. The Court instructs you that evidence of the good character of the defendants bears upon the weight of their testimony and is also to be considered by you as substantive evidence of their innocence. This is because a person of good character is less likely to commit a crime than one of bad character, and the Court instructs you that you should consider such evidence along with all the other evidence in

the case. If after a consideration of all the evidence in the case, including that bearing upon the good character of each of the defendants, the jury entertains a reasonable doubt as to the defendants' guilt, or either of them, then the Court charges you it is your duty to acquit such defendant. But if all the evidence convinces you beyond a reasonable doubt of the defendants' guilt, or either of them, you should so find, as to such defendant or defendants, notwithstanding his or her good character.

You will observe that the defendants, Jacob Ulmon Wiley and Christine Wiley Deaver, are charged in the second count with a violation of the Internal Revenue Code relating to marijuana. You will also observe that the defendants, Christine Wiley Deaver and Eva P. Wiley, are charged in the fourth count with a violation of the same section of law, that is of the Internal Revenue Code referred to in the second count. You will further observe that the defendant, Eva P. Wiley, is charged in the fifth count with the violation of another section of the Internal Revenue Code relating to marijuana. Each offense and the evidence applicable thereto should be considered separately. It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that defendant, that individual defendant, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his or her case determined from his or her own acts and statements and the other evidence in the case that may be applicable to the particular defendant. The defendant, Jacob Ulmon Wiley, is charged in the second count. The defendant, Christine Wiley Deaver, is charged in the second and the fourth counts, and the defendant, Eva P. Wiley, is charged in the fourth and fifth counts. Where a defendant is charged in more than one count, you will find the defendant guilty on all counts in which he or she is charged, or not guilty on all such counts, or guilty on one count

and not guilty as to the others. If you should find the defendants, or either of them, guilty on all counts in which he or she is charged, your verdict should be that you find that particular defendant guilty as charged in the indictment. If you find the defendants, or either of them, not guilty on all counts in which he or she is charged, your verdict should be that you find that particular defendant not guilty as charged in the indictment. If you should find the defendants, or either of them, guilty on one of the counts in which he or she is charged and not guilty as to the other, you should say by your verdict on which count you find the particular defendant guilty and on which count you find him or her not guilty. You are instructed that your verdict on each count must be a unanimous verdict. The fact that you may find all or some of the defendants guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.

The first and the third counts in the bill of indictment in this case have been dismissed by the Court, and the Court instructs you that you are not to consider either the first or the third counts, but you will concern yourself only with the second, fourth and fifth counts in the bill of indictment.

The second count in the bill of indictment reads as follows:

"That on or about June 11, 1958, in the Eastern District of North Carolina, Jacob Ulmon Wiley and Christine Wiley Deaver did wilfully, unlawfully and feloniously transfer 1382.30 grains of marijuana to Narcotic Agent Richard M. Patch without receiving a written order of the person to whom such marijuana was transferred on a form issued for that purpose by the Secretary or his delegate, in violation of the provisions of Title 26, United States Code, Section 4742(a)."

Congress has passed laws imposing penalties for violations of the Internal Revenue laws relating to marijuana.

The second count of the indictment in this case, charges

violation of Title 26 of the United States Code, Section 4742(a), relating to Internal Revenue, which reads as follows:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marijuana, except in pursuance of a written order of the person to whom such marijuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

To convict the defendants, Jacob Ulmon Wiley and Christine Wiley Deaver, or either of them, as charged in the second count of the indictment, the government must convince you beyond a reasonable doubt of two things: first, that the defendants, or either of them, transferred marijuana, and second, that such transfer was made without a written order of the person to whom such marijuana was transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

As to the second count of the indictment, if you find from the evidence beyond a reasonable doubt that the defendant, Jacob Ulmon Wiley, on or about June 11, 1958, in the Eastern District of North Carolina, transferred marijuana to Narcotic Agent Richard M. Patch, and that such transfer was made without a written order of said Narcotic Agent Richard M. Patch, on a form issued in blank for that purpose by the Secretary or his delegate, it would be your duty to find the defendant, Jacob Ulmon Wiley, guilty as to the second count. If you do not so find from the evidence beyond a reasonable doubt it would be your duty to find the defendant, Jacob Ulmon Wiley, not guilty as to the second count.

If you find from the evidence beyond a reasonable doubt that the defendant, Christine Wiley Deaver, on or about June 11, 1958, in the Eastern District of North Carolina, transferred marijuana to Narcotic Agent Richard M. Patch, and that such transfer was made without a written order of said

Narcotic Agent Richard M. Patch, on a form issued in blank for that purpose by the Secretary or his delegate, it would be your duty to find the defendant, Christine Wiley Deaver, guilty as to the second count. If you do not so find from the evidence beyond a reasonable doubt it would be your duty to find the defendant, Christine Wiley Deaver, not guilty as to the second count.

The fourth count in the bill of indictment reads as follows:

"That on or about July 8, 1958, in the Eastern District of North Carolina, Christine Wiley Deaver and Eva P. Wiley did wilfully, unlawfully and feloniously transfer 3835.90 grains of marijuana to Narcotic Agent Richard M. Patch without receiving a written order of the person to whom such marijuana was transferred on a form issued for that purpose by the Secretary or his delefate, in violation of the provisions of Title 26, United States Code, Section 4742(a)."

The fourth count of the indictment in this case charges violation of Title 26 of the United States Code, Section 4742(a), which the Court has heretofore read to you in relation to the second count.

To convict the defendants, Christine Wiley Deaver and Eva P. Wiley, or either of them, as charged in the fourth count of the indictment, the government must convince you beyond a reasonable doubt of two things. first, that the defendants, or either of them, transferred marijuana; and second, that such transfer was made without a written order of the person to whom such marijuana was transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

As to the fourth count, if you find from the evidence beyond a reasonable doubt that the defendant, Christine Wiley Deaver, on or about July 8, 1958, in the Eastern District of North Carolina, transferred marijuana to Narcotic Agent Richard M. Patch, and that such transfer was made without a written order

of said Narcotic Agent Richard M. Patch, on a form issued in blank for that purpose by the Secretary or his delegate, it would be your duty to find the defendant, Christine Wiley Deaver, guilty as to the fourth count. If you do not so find from the evidence beyond a reasonable doubt it would be your duty to find the defendant, Christine Wiley Deaver, not guilty as to the fourth count.

If you find from the evidence beyond a reasonable doubt that the defendant, Eva P. Wiley, on or about July 8, 1958, in the Eastern District of North Carolina, transferred marijuana to Narcotic Agent Richard M. Patch, and that such transfer was made without a written order of said Narcotic Agent Richard M. Patch, on a form issued in blank for that purpose by the Secretary or his delegate, it would be your duty to find the defendant, Eva P. Wiley, guilty as to the fourth count. If you do not so find from the evidence beyond a reasonable doubt it would be your duty to find the defendant, Eva P. Wiley, not guilty as to the fourth count.

The fifth count in the bill of indictment reads as follows:

"That on or about August 18, 1958, in the Eastern District of North Carolina, Eva P. Wiley did wilfully, unlawfully and feloniously acquire or otherwise obtain seven ounces of marijuana without having paid the tax required by law, she being a transferee required to pay the transfer tax imposed by Section 4741(a), Title 26 United States Code, in violation of the provisions of Title 26 United States Code, Section 4744(a)."

The fifth count of the indictment in this case charges violation of Title 26 of the United States Code, Section 4744(a), relating to Internal Revenue, which reads as follows:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) to acquire or otherwise obtain any marijuana without having paid such tax; and proof that any person shall have had in his possession any marijuana and shall have failed, after rea-

sonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741(a)."

To convict the defendant, Eva P. Wiley, of the offense of acquiring marijuana without having paid a transfer tax as charged in the fifth count of the indictment, the government must convince you beyond a reasonable doubt of three things: first, that the defendant, Eva P. Wiley, was a transferee of marijuana, that is, one to whom a transfer of marijuana was made; second, that she was required to pay the transfer tax imposed by Section 4741(a); and third, that she obtained any marijuana without having paid the tax.

The Court charges you that the law imposes a tax on each transferee at the time of securing each order form which is issued in blank by the Secretary or his delegate.

If you find from the evidence beyond a reasonable doubt that the defendant, Eva P. Wiley, on or about August 18, 1958, had in her possession any marijuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by law to be retained by her, such findings shall be presumptive evidence of guilt under this section.

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual

or constructive possession of a thing, their possession is joint. If you find from the evidence beyond a reasonable doubt that the defendant, Eva P. Wiley, either alone or jointly with others, had actual or constructive possession of the marijuana described in the indictment, then you may find that such marijuana was in the possession of said defendant within the meaning of the word "Possession" as used in these instructions.

Presumptive evidence of guilt, as used in the statute, means that mental process by which the existence of one fact is inferred from proof of some other fact with which experience shows it is usually associated by succession or by co-existence. The Court charges you that such presumption of guilt is rebuttable and you cannot convict the defendant unless you are satisfied from all of the evidence and beyond a reasonable doubt of the defendant's guilt.

As to the fifth count, if you find from the evidence beyond a reasonable doubt that the defendant, Eva P. Wiley, on or about August 18, 1958, in the Eastern District of North Carolina, acquired or otherwise obtained marijuana without having paid the tax required by law, and that she was a transferee of marijuana required to pay the transfer tax imposed by law and that she acquired or otherwise obtained marijuana without having paid the tax, it would be your duty to find the defendant, Eva P. Wiley, guilty as to the fifth count. If you do not so find from the evidence beyond a reasonable doubt it would be your duty to find the defendant, Eva P. Wiley, not guilty as to the fifth count.

Now, Gentlemen of the Jury, the defendants in this case, and each of them, plead the defense of unlawful entrapment as to each crime charged in the indictment.

The law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by representatives of the government to commit a

crime, he or she is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case. On the other hand, where a person already has the readiness and willingness to bre. k the law, the mere fact that government agents provide what appears to be a favorable opportunity is no defense, but is a lawful entrapment. When, for example, the government has reasonable grounds for believing that a person is engaged in illicit sale of marijuana, it is not unlawful entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase marijuana from such suspected person.

If then the jury should find from the evidence that, before anything at all occurred respecting the alleged offenses involved in the case, either of the defendants was ready and willing to commit crimes such as those charged against such defendant in the indictment whenever opportunity was offered, and the government merely offered the opportunity, such defendant is not entitled to the defense of unlawful entrapment.

If, on the other hand, the jury should find that the defendants, or either of them, had no previous intent or purpose to commit any offense of the character here charged against him or her and that such defendant did so only because he or she was induced or persuaded by some representative of the government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense as to such defendant, and the jury should acquit such defendant.

The Court charges you that if you find from the evidence that the defendants, or either of them, committed the offenses charged in the bill of indictment, but that the defendants, or either of them, were unlawfully entrapped as defined in these instructions, as to any or all of the counts in which he or she is charged, it would be your duty to find such defendant or defendants not guilty as to such count or counts.

Reference has been made in the argument of this case to the punishment provided by the law in event of conviction. The Court charges you that the punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

Now, Gentlemen, you have paid careful attention to the evidence in this case. You have heard the arguments, able arguments of counsel and the Court will now permit you to retire. Upon your retirement to the jury room you will select one of your number to act as foreman. The foreman will preside over your deliberations and be your spokesman in court.

If there are any objections to the charge I will hear them from the counsel table or you may approach the bench if you prefer.

(Counsel for the defendants and the government stated that there are no objections to the charge.) You may retire.

APPENDIX D

The following article appeared October 13, 1959, conspicuously on the front page of *The News and Observer*, a morning daily paper published in the City of Raleigh, North Carolina:

NARCOTICS RAID NETS WAKE PAIR

"Federal narcotics agents and Wake Sheriff's Deputies swooped down on another marijuana operation last night—this one near Garner—and arrested two Negro men.

Charged with illegal manufacture and possession of narcotics were Willie Sanders, 65, and William Thomas about 25. They face a preliminary hearing before U. S. Commissioner H. C. Bland today.

Deputies said that they seized about "a peck" of cured weed at Sanders' farm, described as 120 acres in size.

50 Bags Shipped

The farm is located five miles east of Garner, officers said. They reported that Thomas, who has worked for Sanders about five years, told them that 50 pounds of marijuana had recently been harvested at the farm and sent off to market in one-pound bags. A pound of the reefer weed brings over $1,000 on the big northern city street corners.

Sanders had over half an acre of the weed growing in two different fields on his farm, the officers said. He was using two tobacco barns to cure the marijuana, they said.

In on the midnight raid were Wake Deputies H. C. Benton, Louis Walters, O. B. Weatherspoon and Joe Lynn.

A major raid on marijuana growing in the eastern United States was made Aug. 19 when State, federal and local officials hauled in over 1,000 pounds of the weed and 11 men and women allegedly connected with the operation in Wake and Cumberland counties. All of those arrested in the August raid are still facing trials in Federal Court."

APPENDIX E

The following article appeared October 13, 1959, conspicuously on the front page of *The Raleigh Times*, an afternoon daily paper published in the City of Raleigh, North Carolina.

MARIJUANA FOUND ON WAKE FARM

"A Wake County farm on which marijuana had been grown, cured and prepared for market was raided last night by Federal narcotics agents and Wake Sheriff's Deputies.

The officers arrested Willie Sanders, 65, and William Thomas, about 25, both Negroes, and charged them with illegal manufacture and possession of narcotics.

Approximately "a peck" of cured weed was found in a pack barn and seized by the officers.

The farm is located about five miles east of Garner on the White Oak Road, just across from Mt. Herman Church. It was described as about 120 acres in size.

Deputy Sheriff O. B. Weatherspoon, who went on the raid, said that officers found two fields, each about a quarter acre in size, where the marijuana had apparently been grown. Stalks had been cut but there was a stubble growth left, Weatherspoon said.

The officers said that Thomas, who has worked for Sanders for about five years, told them that 50 pounds of marijuana had recently been harvested at the farm and sent off to market in one-pound bags.

Other deputies in on last night's raid were H. C. Benton, L. A. Waters and Joe Lynn.

Sanders and Thomas were to be given preliminary hearings before U. S. Commissioner H. A. Bland today."

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 8007

Jacob Uimon Wiley, Eva P. Wiley, and
Christine Wiley Denver,
Appellants,
versus
United States of America,
Appellee.

Appeals from the United States District Court
for the Eastern District of North Carolina,
at Raleigh.
Algernon L. Butler, District Judge.

The petition for rehearing in this case has been read and considered and the Court finds that it is based upon the contention that the joinder of the three defendants for trial was erroneous, which contention was fully considered and rejected in the opinion heretofore filed by this Court; therefore, the petition for rehearing is denied.

FILED
MAY 5 1960
R.M.F. WILLIAMS, JR.
Clerk

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

HERBERT S. BOREMAN
United States Circuit Judge

A true copy,
Teste:

RICHARD M. F. WILLIAMS, JR., Clerk
U. S. Court of Appeals for the Fourth Circuit.

/s/ By MARGARET L. DAVIS,
Deputy Clerk.

APPENDIX G

Addenda to Appendix, incorporated by reference, appellants' (petitioners') brief in the United States Court of Appeals for the Fourth Circuit, said brief filed with the Supreme Court of the United States.

ILE COPY

No. 127

FILED
JUL 22 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

JACOB ULMON WILEY, EVA P. WILEY AND CHRISTINE WILEY DRAVER, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 127

JACOB ULMON WILEY, EVA P. WILEY AND CHRISTINE WILEY-DEAVER, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13-23) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1960. A petition for rehearing was denied on May 5, 1960 (Pet. 39). The petition for a writ of certiorari was filed on June 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly tried together.

2. Whether the verdict should have been set aside on the ground that newspaper articles which did not relate to petitioners prejudiced the jury.

3. Whether the minimum five-year sentence fixed by law for narcotics violations constitutes cruel and unusual punishment.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of North Carolina on marihuana charges. Jacob Wiley and his daughter, Christine Wiley Deaver, were convicted of transferring, on June 11, 1958, 138.230 grains without a proper order form in violation of 26 U.S.C. 4742(a) (count 2). Eva Wiley (wife of Jacob Wiley) and the daughter, Christine Deaver, were convicted of transferring 38.5.90 grains on July 8, 1959 (count 4). In addition, Eva Wiley was convicted of having unlawfully acquired seven ounces without having paid the required tax in violation of 26 U.S.C. 4741 (count 5). Petitioners were each sentenced to a total of five years imprisonment, the minimum punishment for the violations of 26 U.S.C. 4742(a) (Tr. 188-189). The court of appeals affirmed the convictions.

The evidence may be summarized as follows:

1. Narcotics agent Patch testified that on June 5, 1958, he went to a store near Garner, North Carolina, operated by Christine Deaver and her husband where he saw all three petitioners. He asked Jacob Wiley about the purchase of marihuana and was told to return

later (Tr. 3). At that time Jacob said he had some seed (Tr. 26). Patch returned on June 11 and talked with Christine Deaver. When he asked her if she had marihuana for sale, she said that she did not have marihuana but did have seed, enough to sow about four acres. When Patch asked to see the seed, she told him to wait until her father returned (Tr. 4).

When Jacob Wiley returned at about 5:00 p.m., Patch said he would like to buy about ten pounds of marihuana. Wiley replied that he did not have any. He then said he had some seed. The two men and Mrs. Deaver went to the Wiley residence where Wiley took from a shelf in a small room at the rear of the house a large brown paper bag which contained approximately two pounds of marihuana seed. The daughter said the price for the bag would be $125, but Patch bought a lesser amount for which he paid $20 (Tr. 4-5).

2. On July 8, Patch returned and met Christine Deaver who invited him into the Wiley residence. When Patch indicated that he wanted to buy more seed, Mrs. Deaver went to the rear of the house and returned with a brown paper bag containing approximately one pound of marihuana seed which she said she would sell for $125. Patch offered $50 for a half pound. Mrs. Wiley went to the rear of the house and brought back scales on which Mrs. Deaver weighed out a half pound (Tr. 6-7).

On cross-examination Patch said that one Alvin Blount had accompanied him at the time of the two sales and on other visits to the store but not on every occasion when he went to petitioners (Tr. 10-11, 20).

Blount, who was under charges for narcotic offenses at the time he accompanied Patch and at the time of trial, testified on rebuttal, over petitioners' objection. He said he was with Patch on June 5 as well as June 11 and July 8, and that he went to the Wiley residence about six times. His version of the transactions on June 11 and July 8 was substantially similar to that given by Patch, except that he said that on July 8 Mrs. Wiley reached into the bag of marihuana and said it was "good stuff" (Tr. 156-163).

3. On August 18, a search warrant was executed at the Wiley residence. During the course of the search, Mrs. Wiley asked permission to obtain some aspirin and went to a rear room. An agent who was watching her saw that she had something concealed under her arm. This proved to be a brown paper bag containing marihuana seed. The petitioners said it had been bought to the house by a person named Dan George (Tr. 30-33, 39-43).*

4. Each of the petitioners took the stand. Jacob Wiley testified that one morning, late in May, while he and one Vernon Phillips were moving an old sewing machine, some of the drawers fell out, exposing a brown paper bag with green seed. Phillips told Wiley it was "reefer seed," terminology Wiley did not then understand (Tr. 78-79). Wiley said he gave the seed to a

* One of the agents who executed the search warrant testified that, before he identified himself, Wiley had told him that George had approximately twenty pounds of marihuana that Wiley was going to "work" that night (Tr. 43). This testimony was originally admitted against Jacob Wiley alone (Tr. 44), but later the judge told the jury to disregard the evidence entirely (Tr. 71).

neighbor (Tr. 80, 89-90). On June 4, according to Wiley, Blount and another man, who proved to be agent Patch, asked him for directions. While they were there, Phillips came up, greeted Blount, and said that Blount could explain to Wiley what the seed was. When Wiley said he had given away the seed, Patch asked if he could get it back and Wiley agreed to do so. Wiley testified that he did get it back and Patch offered him $20 for a cupful. Wiley told Phillips to make the sale; which he did (Tr. 80-81). Thereafter, according to Wiley, Patch tried to buy marihuana from him, but Wiley refused to have any such dealings. Wiley denied that he saw Patch on June 11 (Tr. 81-82).

Mrs. Wiley testified that on June 11 she heard someone ask her daughter if she had "any of that stuff" and heard the daughter say that she had more of the seed (Tr. 103-104); that Mr. Blount got the scales. The mother understood that the men left $50 (Tr. 103-105). She said that no one came to the house during July (Tr. 106). She said she tried to hide the marihuana seed when the search warrant was being executed in order to protect her home (Tr. 108).

Mrs. Deaver testified that on June 4 Patch and Blount asked for her father and on June 5 told her they were "big time" operators looking for "stuff" (Tr. 118-120). On June 11, when her father was not at home, she saw the two men who asked about the seed her father had promised. She said Blount got the seed and the scales and offered her $100. When she said he would not sell, he said he was leaving $50 which she could give to her father (Tr. 122-123). She denied any transaction on July 8 (Tr. 123).

Petitioners also offered character witnesses who testified to their good reputation (Tr. 133-144, 152-156).

ARGUMENT

1. Petitioners' contention that their motions for a severance should have been granted is without merit. All the charges arose out of interrelated transactions in marihuana seed and were part of a course of dealing between agent Patch and the Wiley family. The counts therefore were properly joined under Rule 8(b), F. R. Crim. P. See *United States* v. *Taffanelli*, 131 F. 2d 890 (C.A. 7); *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811.

There was no prejudice resulting from the joinder. The transactions were so interrelated that evidence of one would properly have been admissible as showing the background for the other. The trial court took great pains to protect the defendants and excluded evidence which would properly have been admissible against one defendant alone as bearing on his knowledge and intent (see, as to Jacob Wiley, *supra*, p. 4, footnote; as to Christine Deaver, Tr. 68-69). The court also carefully charged the jury to consider separately the evidence relating to each offense and each defendant and not to consider against one defendant evidence admitted only against another (Tr. 174). There is thus no basis for the claim of prejudice. See *Schaffer* v. *United States*, Oct. Term 1959, Nos. 111 and 122, decided May 16, 1960.

2. After trial, petitioners moved to set aside the

verdict on the ground that articles appearing in the Raleigh newspapers while the trial was in progress prevented a fair trial. The articles (Pet. 37-38) did not, however, relate to the petitioners or to their trial or to persons mentioned at the trial. The articles merely reported that federal narcotics agents had arrested another group for manufacture and possession of marihuana in Garner, North Carolina, the general region where petitioners lived. As the district court pointed out in denying the motion for a new trial (Tr. 185-186), if mere notice of similar crimes in the neighborhood were sufficient to invalidate a trial, it would be difficult ever to try a case in many large metropolitan areas.

3. The trial judge imposed the minimum sentence fixed by Congress for the offenses charged. A five-year sentence of imprisonment for a serious crime is not unusual punishment which violates the Eighth Amendment. See *Black* v. *United States*, 269 F. 2d 38, 43 (C.A. 9); *Latham* v. *United States*, 259 F. 2d 393, 397 (C.A. 5). The trial court indicated that in fixing sentence he considered age and "every other fact that has been brought before the Court, including the presentence investigation," and that the sentence as to Jacob Wiley would have been heavier were it not for his age (Tr. 187).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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